IN THE

Supreme Court of the United States

October Term, 1966.

No. [redacted]178

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

UNITED INSURANCE COMPANY OF AMERICA
and
INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, Respondents.

No. [redacted]179

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
UNITED INSURANCE COMPANY OF AMERICA,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT UNITED INSURANCE COMPANY OF AMERICA IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1409.

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v.

UNITED INSURANCE COMPANY OF AMERICA

AND

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,
Respondents.

No. 1410.

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

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UNITED INSURANCE COMPANY OF AMERICA,
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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT UNITED INSURANCE COMPANY OF AMERICA IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals (Pet. App. in No. 1409, pp. 17-33; Pet. App. in No. 1410, pp. 1a-15a) is reported at 371 F. 2d 316 (1966). The decision and order of the National Labor Relations Board (J. A. 1122-1183, 1199-1200) [1] are reported at 154 N. L. R. B. 38 (1965).

JURISDICTION.

The judgment of the Court of Appeals was entered on December 21, 1966. On March 21, 1967, Mr. Justice Clark extended the time for filing petitions for writs of certiorari to and including May 20, 1967. Both the petition for a writ of certiorari in No. 1409 and the petition for a writ of certiorari in No. 1410 were filed on May 19, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Court of Appeals, in the proper exercise of its power of judicial review, correctly applied to the "debit agents" of United Insurance Company of America in Baltimore City and Anne Arundel County, Maryland, the common law distinction between "employe" and "independent contractor", embodied in Section 2(3) of the National Labor Relations Act, as amended, 29 U. S. C. § 141 *et seq.*

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 141 *et seq.*), are set forth in the petitions (Pet. App. in No. 1409, pp. 35-36; Pet. App. in No. 1410, pp. 24a-27a).

1. "J. A." refers to the Joint Appendix filed in the Court of Appeals.

STATEMENT.

1. Background. United Insurance Company of America ("United") is an Illinois corporation engaged in the writing and sale of commercial and industrial life, health and accident, and hospitalization insurance policies. United's insurance policies are sold and serviced by independent agents known as "debit agents". Since July, 1953, Insurance Workers International Union, AFL-CIO (the "Union") has sought to represent various units of United's debit agents for purposes of collective bargaining. United has consistently maintained that its debit agents are independent contractors, rather than employes, within the meaning of Section 2(3) of the National Labor Relations Act (the "Act"), as amended, 29 U. S. C. § 141 *et seq.* This issue as to the independent contractor or employe status of United's debit agents has been presented to the United States Court of Appeals for the Seventh Circuit on three occasions.

On the first occasion, the Court of Appeals refused enforcement of an order of the National Labor Relations Board (the "Board"), which would have required United to bargain with the Union, on the ground that United had been denied procedural due process. The Court remanded the case to the Board. **United Insurance Company of Amercia v. N. L. R. B.**, 272 F. 2d 446 (C. A. 7, 1959).

On the second occasion, the Court of Appeals squarely met the question raised here and refused to enforce the Board's order directing United to bargain with the Union, on the ground that United's debit agents were, in fact, independent contractors and not employes within the meaning of the Act. **United Insurance Company of America v. N. L. R. B.**, 304 F. 2d 86 (C. A. 7, 1962)

On the third occasion—the instant case—the Court of Appeals reaffirmed its prior decision, again concluding that United's debit agents were independent contractors and not

employes within the meaning of the Act, and once again refused enforcement of a Board order directing United to bargain with the Union. Pet. App. in No. 1409, pp. 17-33; Pet. App. in No. 1410, pp. 1a-15a).[2]

Following the Court of Appeal's second decision (304 F. 2d 86), United entered into a reinsurance agreement in December, 1963, with Quaker City Life Insurance Company ("Quaker"), a Philadelphia, Pennsylvania corporation. Under the terms of the agreement, United agreed to reinsure Quaker's outstanding policies in a number of states, including those in force in Baltimore City and Anne Arundel County, Maryland.

United, which had for some considerable time prior thereto sold and serviced policies in Baltimore City and Anne Arundel County, Maryland, through independent contractor agents, continued to do so subsequent to the execution of the reinsurance agreement. However, Quaker had previously established an employer-employe relationship with its debit agents, and its agents in Baltimore City and Anne Arundel County, Maryland had been represented by the Union.

Upon the effective date of the reinsurance agreement (March 16, 1964), Quaker terminated all of its employes. Shortly thereafter, some of Quaker's former agents in Baltimore City and Anne Arundel County, Maryland applied for and were granted independent agencies by United. Thereupon, the Union immediately sought recognition as the bargaining representative of all of United's debit agents in Baltimore City and Anne Arundel County, Maryland.

When United refused to recognize the Union, the parties entered into a stipulation for certification upon consent election. Paragraph 13 of the stipulation expressly

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2. While the first two cases involved United's licensed debit agents in Pennsylvania, and the present case involves United's licensed debit agents in Baltimore City and Anne Arundel County, Maryland, this difference in geography is without significance since United's independent contractor agency system is the same throughout the United States.

reserved to United the right to raise the issue of the independent contractor status of its agents in any subsequent unfair labor practice proceeding brought by the Union (J. A. 1047).

Thereafter, following the Union's certification by the Board, and United's refusal to bargain on the ground that its agents were independent contractors rather than employes within the meaning of the Act, the Union instituted unfair labor practice proceedings against United, charging United with violating Section 8(a)(1) and (5) of the Act. These proceedings eventuated in this case.[3]

2. Facts. The debit agents involved in this proceeding are independent insurance agents who are engaged by United, pursuant to the terms of individual contracts called the "Agent's Commission Plan", to sell and service United's insurance policies. They primarily sell and service United's industrial life insurance policies.[4] However, they also sell and service United's commercial life, health and accident, and hospitalization insurance policies (J. A. 25, 173-175, 397, 693, 755). Many of these debit agents are licensed to sell insurance for other companies, includ-

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3. This case in no way involves any question of the rights and obligations of a successor employer. That issue was raised by the Union in a separate proceeding which it instituted in January, 1964 in the United States District Court for the District of Columbia (Civil Action No. 57-64). The Union's complaint in that case was dismissed with prejudice by stipulation of the parties on March 16, 1966. Thus, the only question presented to, and decided by, the Court of Appeals in this case was whether, on this particular record, United's debit agents in Baltimore City and Anne Arundel County, Maryland, were employes or independent contractors within the meaning of Section 2(3) of the Act.

4. By Maryland law, industrial life insurance is limited to policies under which premiums are payable on a weekly basis, and policies of $1,000 or less, under which premiums are payable monthly or more often. Commercial or ordinary life insurance is sold in policies of $1,000 or more, with premiums payable quarterly, semi-annually, or annually (J. A. 397-398; Ann. Code of Md., Art. 48A, §387).

ing those issuing policies competitive with United's (J. A. 173-174, 291-292, 616, 864).[5]

When an agent is engaged, he is ordinarily given a debit book.[6] The debit book contains records of policy holders of United from whom the agent agrees to collect premiums and remit the net amount, less commissions, to United (J. A. 174, 194, 696-697). There is no geographical limitation or boundary of activity imposed by a debit book. The areas represented in various debit books may and often do overlap (J. A. 216-219, 695-696, 816-817, 834). A Maryland agent may write insurance anywhere in Maryland (J. A. 217, 411). The only restriction on the agent's ability to write insurance is the various states' insurance laws (J. A. 411). Some Maryland agents have policy holders residing in other states carried in their debit books (J. A. 695-697).

United does not make a calculated effort to arrange the debits so that the agents work in a given geographical area. However, some agents do so themselves by voluntarily transferring policyholders to other agents. This occurs, for example, when a debit area becomes so widespread that, in the opinion of the agent, it is overly difficult to service. Other agents transfer policyholders only when they have trouble collecting premiums. This transfer of policyholders from one agent to another is done by the agents, for their own convenience, and without any re-

5. In order to sell insurance, an agent must be licensed by the State (J. A. 880; Ann. Code of Md., Art. 48A, § 167). The license authorizes the agent to sell specific types of insurance for a specific company (J. A. 880; Ann. Code of Md., Art. 48A, § 166a). The agent pays the fee for his initial license and is not reimbursed by United (J. A. 694, 728, 755, 811). If an agency relationship is terminated, United must notify the State Insurance Department, which, in turn, cancels the agent's license to sell insurance for United (J. A. 881).

6. The term "debit" is usually used to refer to the book that contains the names of and data concerning policyholders serviced by an agent. The term is sometimes used to refer to the area embraced by the addresses in the book at a particular point in time.

striction or limitation by United (J. A. 251, 255-256, 259-262, 307-308, 312-315, 511-513, 697-698, 715-718, 839-840).

For administrative purposes only, each agent is placed, with his consent, on a "staff" of an assistant manager. An agent may not be transferred from one "staff" to another without his consent (J. A. 417). An assistant manager accompanies an agent on his debit only if the agent so requests. When an agent does not produce desirable results, an assistant manager may offer to accompany the agent, but never does so without the agent's consent (J. A. 233-234, 309-310, 484-485, 516-518, 743-744). Assistant managers do not accompany agents on a regular basis (J. A. 460-461), nor are there any specific instructions to the assistant managers as to how they should attempt to aid the debit agents (J. A. 561-563).

The contract of each agent, known as the "Agent's Commission Plan", is terminable at will by either United or the agent (J. A. 1058). Since the agent contracts to produce results, his agency may be terminated if he does not produce results to the extent that may reasonably be expected. Of course, an agency may also be terminated for embezzlement or excessive shortages in an agent's accounts (J. A. 442-443, 568-569). Almost all of United's debit agents in Baltimore City and Anne Arundel County, Maryland are operating under individual contracts embodying the 1962 Revised Agent's Commission Plan, but a few may still be operating under individual contracts incorporating the prior Agent's Commission Schedule. The agents who had signed the earlier agreement were given the option of executing or not executing a contract embodying the Revised Agent's Commission Plan (J. A. 492-494, 892-893).

United's debit agents receive no salary, advance or draw, but are compensated solely by commissions on premiums collected, on new business and on increases in business or collections (J. A. 424-425, 429-430). There is no minimum or maximum limit to the amount of compensation

which a debit agent may earn (J. A. 195-199, 705, 746). The annual income of United's debit agents in Baltimore City and Anne Arundel County, Maryland ranges between $7,000 and $20,000 (J. A. 414).

When an agent's servicing of his debit requires him to cover an unusually large, outlying area, he may receive an additional 1% commission on collections. This additional commission varies from week to week with collections, but has no relationship to and does not vary with the agent's travel expenses. In fact, it is entirely possible in any week for travel expenses to increase and for the additional compensation to decrease. Therefore, this additional 1% commission plainly constitutes added compensation in recognition of more difficult conditions, and not reimbursement for travel expenses as such (J. A. 375, 409-410, 519-520, 617).

United's debit agents operate completely on their own. They determine their own hours of work from day to day as well as the days on which they choose to service their debits (J. A. 238-239, 372-373, 402-403, 499, 518-519, 833-836). Although premiums on industrial insurance are due weekly, the agents make their own business arrangements with their policyholders or other collection media as to how often they collect premiums (J. A. 342-343, 398-399, 408-409, 415).

The debit agents are not required to make any specific number of collection calls per day or per week, nor are they required to report to United the number of collection calls they make (J. A. 699-702). They are not required to make any specific number of new business calls, nor are they required to report the number of such calls they make (J. A. 731). Similarly, they are not required to report the number of hours worked, the number of days worked, or the specific days in the week worked or not worked. They are not told what policies they must sell or what prospects to call on for new business (J. A. 178-181, 190-194). The debit agents have no quota to meet

(J. A. 286). They are not told where to seek new business, nor does United give them any leads (J. A. 698).

United's debit agents pay their own business expenses, including transportation, advertising, entertaining, postage, telephone calls, business cards, and gifts to policyholders and new prospects (J. A. 230-233, 431-432, 507-508, 540, 617-618, 706-709, 758-761, 835, 851-852, 1114). Brochures advertising United's policies, sometimes calendars at the end of the year, and occasionally paper matchbooks, are available to the agents on shelves in the district offices, if the agents wish to use them (J. A. 113-120, 747-748).

The agents pay for all their postage, except that when a policyholder chooses to mail his premium together with his premium receipt book in to the district office, the district office, in order to accommodate the policyholder, will sometimes return the premium receipt book to the policyholder paying the postage (J. A. 97-98, 725). Business cards are not furnished to the agents by United. Those agents who desire to use business cards—and many do—purchase them either through the office or from any other source they choose, but always at their own expense (J. A. 757-759).

United's district offices exist as a matter of company organization and administration (J. A. 458-459). United pays all of the expenses of its district offices. Agents may, at their own election, use the tables and chairs in the district offices while preparing reports, but they may not use them for the general conduct of their business. The agents may also occasionally use the telephone available in the district office, but they may not generally use the company phone either for business or personal purposes (J. A. 298-299). Most agents spend no more than three to four hours a week in the district office and, of this time, two to three hours are consumed on the morning when most of them make their weekly reports (J. A. 318, 867-868, 873).

Most agents use a room in their home either exclusively or partially as an office in which they conduct their business. They have desks, phones, sometimes type-

writers, adding machines, files, stationery, etc. The cost of the maintenance of such facilities, and also all the other expenses personally incurred by the agents in the conduct of their business, are deducted as business expenses by them in their income tax returns (J. A. 230-232, 725, 866-867). In addition, some agents hire assistants, at their own expense, to help them with their collections (J. A. 219-221, 410, 708-710, 759-760, 866). However, with respect to selling insurance (as distinguished from making collections or handling claims), one must be licensed by the state whether he sells on his own behalf or on behalf of another (J. A. 456-457).

United furnishes each of the agents involved herein with an insurance rate book containing the rates which have been approved by the Insurance Department of the State of Maryland and which cannot be varied without the approval of that Department. The rate book sets forth certain prohibitions and regulations prescribed by state law; advises the agents of the types of risks which United will not insure; and contains recommendations and suggestions as to the selling and servicing of United's policies (J. A. 92-93, 487-488, 893-894, 1068-1096).

United supplies its agents with various reporting and claim forms as a matter of administrative convenience to both the agents and United. Most relevant of these reporting forms are the "Agent's Weekly Account" (J. A. 1060-1061) and the "Abstract of Agent's Weekly Report" (J. A. 1064) used weekly by the agents in settling with United. On the front side of the former document, the agent lists the status of each policyholder so that United will know what policies are still in force (J. A. 419-420), and on the reverse side the agent shows "premiums paid even and in advance" and "premiums in arrears". The front section of this form is completed weekly, but the reverse side is completed only once every three months (J. A. 56-58).

Since United requires its district office managers to submit weekly reports by Monday, the agents are requested to submit their weekly reports by Thursday or Friday (J. A. 41, 207-216, 503-506, 703). However, the agents may submit their reports on days other than Thursday or Friday and no penalty is imposed for doing so (J. A. 207-216, 505-506, 842-845, 856-857). Further, no agent is required to report in person to the district office to settle his account. Reports may be mailed to the district office; at least one Baltimore agent never brings in his collections or reports in person (J. A. 449-451).

While lapse forms must be submitted to United by the agents in order to inform United of lapsed policies and applications for insurance obviously must be submitted to United (J. A. 81-85, 93-94), the agents are not required to go to the district office for this purpose. Nor are the agents required to go to the district office in order to check the "life register" or to pick up "office pays" and new policies (J. A. 61-63, 236-237, 318-320, 422-423).

In returning net premiums (less commissions) to United, the agents need not turn in cash; money orders and checks are regularly accepted (J. A. 450-451). At least one agent has continually used his personal check for this purpose (J. A. 704). Collections, like the accompanying reports, need not be personally brought to the district office, but may be mailed to the office by the agents (J. A. 451).

On the days when the agents submit their weekly reports to United, an assistant manager will frequently hold an informal meeting of the agents who are present to discuss sales techniques with them. However, attendance at such informal meetings is not required, and United takes no action in the case of agents who elect not to participate (J. A. 522-523, 533, 703, 742-743).

The agents are not required to process or pay claims. However, many of them do so, because it helps them to obtain and retain business. If an agent elects to make advance payment of claims, he may do so without United's

approval, but only at his own risk (J. A. 277, 473-474, 516, 521-522, 703-704, 838-839, 846-850).

United does not withhold federal or state or local income taxes, or payments for pension or welfare or group life insurance. It may, at the agent's specific direction, and only in the amount so directed, accept payments from the agents for these items. If an agent does not wish any of these items to be handled through United, they are not (J. A. 546-553, 704-705, 839, 889-890). Participation in United's group insurance and profit-sharing pension plans is on a strictly voluntary basis (J. A. 71-73, 546-552, 711, 889-890, 1098-1104), and the individual agent and United contribute equally to these plans (J. A. 1101-1102). The agents qualify for participation in United's profit-sharing pension plan as independent contractors under Section 7701(a)(20) of the Internal Revenue Code, which defines "employe" to include not only employes in the traditional, common law sense, but also all full-time life insurance salesmen, whether they be employes or independent contractors.

United's agents receive no paid vacations, no paid holidays, and no paid sick leave (J. A. 427-428, 475-476, 709). The agents decide themselves if and when they will take time off (J. A. 320, 710-711). If a holiday is taken, the agent may request an assistant manager to service his debit or may hire some other person to do so. The same situation obtains if the absence is by reason of illness (J. A. 410, 565-567, 788).

3. Decisions. On the basis of these facts, the Court of Appeals determined that there was not substantial evidence on the record, considered as a whole, to support the Board's conclusion that United's debit agents were employes, rather than independent contractors, within the meaning of Section 2(3) of the Act. Accordingly, the Court of Appeals refused enforcement of the Board's order directing United to bargain with the Union.

The Court of Appeals correctly applied the common law distinction between employes and independent contractors, embodied in Section 2(3) of the Act, to the facts on the record before it and found that, when tested against that principle, the facts utterly failed to demonstrate that United had retained the right to direct and control **the details of the manner and means** [7] by which the agents conduct their business.

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7. Wherever bold face appears in this brief, the emphasis is ours.

ARGUMENT.

1. Petitioners argue that this Court should review the decision of the Court of Appeals because it affects not only United's agents, but all insurance agents, and even traveling salesmen, collection agents, newsboys and milkmen (Pet. in No. 1409, p. 12; Pet. in No. 1410, p. 15). This argument is completely lacking in foundation. Under the law, the resolution of the employe or independent contractor status of a specific group of workers must be determined solely by reference to **the particular facts of the particular case.** See, *e.g.*, **N. L. R. B. v. Lindsay Newspapers, Inc.**, 315 F. 2d 709 (C. A. 5, 1963) (newspaper carriers as employes); **N. L. R. B. v. A. S. Abell Company**, 327 F. 2d 1 (C. A. 4, 1964) (newspaper carriers as independent contractors); **N. L. R. B. v. Nu-Car Carriers**, 189 F. 2d 756 (C. A. 3, 1951) (motor carrier drivers as employes); **National Van Lines, Inc. v. N. L. R. B.**, 273 F. 2d 402 (C. A. 7, 1960) (motor carrier drivers as independent contractors); **Minnesota Milk Company v. N. L. R. B.**, 314 F. 2d 761 (C. A. 8, 1963) (milk routemen as employes). And see, especially, **N. L. R. B. v. Phoenix Mutual Life Insurance Company**, 167 F. 2d 983 (C. A. 7, 1948), where the very Court which here decided that United's debit agents were independent contractors, there decided that Phoenix Mutual's debit agents were employes.

The decision of the Court of Appeals is, therefore, necessarily limited to the facts appearing on this record, and cannot possibly affect any other group of workers whose business relationship varies in the slightest degree from that which exists between United and its debit agents. Moreover, both in this case and in the last case involving the identical parties and the identical issue (Pet. App. in No. 1410, pp. 16a-23a), the Court of Appeals expressly limited its decision to "* * * the facts in the particular case * * *" before it (Pet. App. in No. 1410, p. 21a) and

"* * * the record *in this particular case* * * *" (Pet. App. in No. 1409, p. 24; Pet. App. in No. 1410, p. 7a) (Emphasis by the Court of Appeals).[8]

Petitioners pretend to discover in the decision of the Court of Appeals a new exception—which they gratuitously term the "business necessity" exception—to the general rule otherwise determinative of employe or independent contractor status. The Court of Appeals neither announced nor relied upon any such "exception" in its decision. Rather, the Court of Appeals expressly reiterated and applied the controlling principle

> "* * * that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. * * * the critical distinction between employees and independent contractors under the Act is the right to control the manner and means by which the agent conducts his business. * * *" (Pet. App. in No. 1409, p. 22; Pet. App. in No. 1410, p. 6a)

Upon the application of this principle, the Court of Appeals concluded that there was not substantial evidence on the record, considered as a whole, to support the Board's determination and order. The Court of Appeals found

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8. Petitioners' contention that this decision is of far-reaching importance is particularly difficult to understand since petitioners have persistently denied the applicability of a final decision involving one unit of United's debit agents to any other unit of United's debit agents, let alone to other workers in no way associated with United. There is presently pending before the Court of Appeals a fourth case, brought by petitioners, raising the very same issue as is raised herein and which was raised in each of the earlier cases (272 F. 2d 446; 304 F. 2d 86, Pet. App. in No. 1409, pp. 16a-23a). Moreover, this latest case involves the very same unit of United's debit agents as was involved in the Court of Appeals' 1962 decision (304 F. 2d 86, Pet. App. in No. 1409, pp. 16a-23a).

"* * * no support in the record for some of [the Board's] findings and but tenuous support for others * * *" (Pet. App. in No. 1409, p. 27; Pet. App. in No. 1410, p. 10a). The Court of Appeals found that the remaining factors relied upon by the Board were entirely consistent with independent contractor status and were

> "* * * not indicative of an existence or exercise of control directed to the 'manner and means' by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors." (Pet. App. in No. 1409, p. 27; Pet App. in No. 1410, p. 10a)

We respectfully submit that, in so concluding, the Court of Appeals was eminently correct. Surely, such factors as the agents' voluntary attendance at sales meetings, United's concern that it be informed of the transfer of policies between agents, and United's insistence that the agents produce reasonable results and make a proper accounting of premiums collected, do not demonstrate that United has retained the right to direct and control **the details of the manner and means** by which the agents conduct their business.

We can appreciate petitioners' keen sense of disappointment as repeatedly unsuccessful litigants. However, petitioners' proposal that a blanket rule be adopted declaring all debit insurance agents to be employes is totally without merit. The employe or independent contractor status of a particular group of workers can only be determined, under the law, on a case by case, and not on an industry by industry, basis. Petitioner Union's outside-the-record estimate that there are approximately 100,000 debit agents in this country (Pet. in No. 1410, p. 15) is,

therefore, completely lacking in significance. The debit agents involved in this case were properly found to be independent contractors, and not employes, within the meaning of Section 2(3) of the Act, solely on the basis of **the particular facts appearing on this particular record.** In its brief to the Court of Appeals, petitioner Union repeatedly asked that Court to consider this case on the facts of "this particular record". Now that the Court of Appeals has done just that, petitioner Union wishes to substitute an industry approach totally unsupported by the record.

Petitioner Union's attack upon the Court of Appeals' decision as based upon that Court's "* * * own private preferences and prejudices * * *" (Pet. in No. 1410, p. 12) is also wholly unjustified and insupportable. As the Court of Appeals, fully aware of the necessity for case by case adjudications in this area of the law, so succinctly stated in the last case involving United's debit agents:

> "* * * some insurance companies have established an employer-employee relationship such as the company in N. L. R. B. v. Phoenix Mutual Life Insurance Company, *supra* [167 F. 2d 983 (C. A. 7, 1948)].
>
> "In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do." (Pet. App. in No. 1410, p. 23a)

2. Petitioners also urge, as a reason for this Court to grant review, that the Court of Appeals improperly exercised its power of judicial review. The short answer to this contention was given by this Court in its decision in **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474 (1951):

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of

the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." (340 U. S. at 490-491)

This case is not that "rare instance". The Court of Appeals properly apprehended and applied the governing standard of review:

> "Under the principles governing our review of the factual findings of the trial examiner, adopted by the Board, those findings are to be accepted if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. National Labor Relations Board,* 340 U. S. 474. But this formula for judicial review of the Board's administrative action was recognized in *Universal Camera* (340 U. S. p. 489) as affording '[s]ome scope for judicial discretion' and approved with the express realization that '[t]here are no talismanic words that can avoid the process of judgment', and the admonitions (340 U. S. 488 and 496) that '[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight' and that the examiner's findings are not to be 'given more weight than in reason and in the light of judicial experience they deserve' and 'are to be considered along with the consistency and inherent probability of testimony'. * * *" (Pet. App. in No. 1409, p. 24; Pet. App. in No. 1410, pp. 7a-8a)

Guided by this standard, and considering the record, including the overwhelming body of evidence opposed to the Board's view, as a whole, the Court of Appeals concluded that

> "* * * in addition to the infirmity of some of the critical findings from the standpoint of lack of substantial evidentiary support, and the insignificant or

equivocal nature of the factors embraced in other findings, we are confronted with a record which, when viewed in the light consideration in its entirety furnishes, is revealed to be tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order. There is too much which detracts from the weight of the evidence relied upon to support the findings and conclusions." (Pet. App. in No. 1409, p. 32; Pet. App. in No. 1410, p. 15a)

In so concluding, we respectfully submit, the Court of Appeals stayed well within the bounds of judicial review outlined by this Court in **Universal Camera**, *supra*. The Court of Appeals not only found "* * * no support in the record for some of [the Board's] findings and but tenuous support for others * * *" (Pet. App. in No. 1409, p. 27; Pet. App. in No. 1410, p. 10a); it also found that the Board's findings and conclusions were, in material part, erroneously predicated upon the trial examiner's own subjective impressions of certain off-the-stand demeanor allegedly exhibited by United's debit agents in the hearing room.[9]

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9. With respect to this point, the Court of Appeals stated:

"In adopting the trial examiner's findings, conclusions, and recommendations the Board specifically disavows reliance upon the demeanor 'observation' made by the examiner. But we do not perceive how this disavowal can serve to remove from the examiner's findings and conclusions the flavor with which his demeanor observation tainted them. *Cf. Wheeler v. N. L. R. B.*, D. C. Cir., 314 F. 2d 260, 263; *N. L. R. B. v. American Federation of Television and Radio Artists*, 6 Cir., 285 F. 2d 902, 903. Our study of the record leaves us with a distinctive impression that the flavor of the demeanor observation and accompanying rationalization not only pervades the examiner's credibility resolutions, and thus taints the findings and conclusions resulting from the testimony so credited, but also that independent evidentiary content and force may well have been given, albeit undesignedly, to the 'employee attitude' the examiner so tenuously surmised was reflected by debit agents' off-the-stand demeanor." (Pet. App. in No. 1409, p. 32; Pet. App. in No. 1410, pp. 14a-15a).

Petitioners' unhappiness with the court's ultimate conclusion is surely understandable but, just as surely, it is beside the point.

3. Petitioners finally assert that this case is one of "undisputed facts" (Pet. in No. 1409, p. 12; Pet. in No. 1410, p. 17). Yet petitioners and respondent have engaged in extensive litigation, during the past fourteen years, over the existence and significance of the very facts petitioners now claim to be "undisputed". A comparison of the facts set forth in the respective petitions with the facts set forth in the Court of Appeals' decision or in this brief readily demonstrates the factual conflicts inherent in this case. Under the law, resolution of the issue raised in this case can only be determined by reference to **the particular facts of the particular case.** This case plainly turned upon its own peculiar facts and is, indeed, expressly limited to them.

The decision of the Court of Appeals cannot, therefore, possibly be characterized as one of far-reaching importance or as being in conflict with any other decision of any other Court of Appeals. Petitioner Union's contention that the decision in this case cannot be reconciled with the decision in **Capital Life and Health Ins. Co. v. Bowers,** 186 F. 2d 943 (C. A. 4, 1951) is patently absurd (Pet. in No. 1409, p. 17). Neither the issue nor the facts in that case bear the slightest resemblance to those presented in the instant case. The absence of any conflict between the circuits on this issue is further underscored by petitioner N. L. R. B.'s failure to advance such a ground as a reason for the granting of its petition.

In short, all debit insurance agents are not, simply by virtue of their being debit insurance agents, employes within the meaning of Section 2(3) of the Act, as petitioners would have this Court hold. Nor are they all independent contractors. Under the law, whether a group of debit agents, or any other group, has employe rather than independent contractor status, can only be ascertained by

first determining, **on the facts of the particular case**, whether "* * * the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to **the details and means by which that result is accomplished** * * *" (Pet. App. in No. 1409, p. 22; Pet. App. in No. 1410, p. 6a).

Accordingly, it is entirely clear that the same Court of Appeals may, in one case, properly determine that the debit agents of an insurance company are employees [see, *e.g.*, **N. L. R. B. v. Phoenix Mutual Life Insurance Company**, 167 F.2d 983 (C. A. 7, 1948)] and, in a second case, as here, properly determine that the debit agents of another insurance company are independent contractors. The law anticipates nothing less and requires nothing more.

CONCLUSION.

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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